

STATE OF VERMONT
DEPARTMENT OF EDUCATION

In Re:

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Special Education Due Process
Docket No. DP06-40

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction and Procedural History

The parents filed a request for due process on November 7, 2006 on behalf of their son (student) disputing the interim alternative educational setting proposed by the Franklin Northeast Supervisory Union (district).

The district held a manifestation determination on October 26, 2006. At the manifestation determination, the parties found that the student's behavior is a manifestation of his disability. Based on this finding, the district notified the parents that the student would be placed in an interim alternative educational setting (IAES). The IAES was comprised of tutoring until November 13, 2006 when the student would be placed at Project SOAR, a therapeutic school. The parents disagreed with the district's proposed action and filed for expedited due process.

The student receives Section 504 services based upon a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and is presently being evaluated for special education services based upon specific learning disability and emotional disturbance. Based upon VSER § 4313.5, the student is entitled to the due process protections accorded in special education cases.

An initial telephone conference was held on November 10, 2006. Both parents participated in the conference. The director of special education, and the principal, participated on behalf of the district. All parties appeared *pro se* at the initial telephone conference. A Scheduling Order was issued on November 10, 2006.

Samuel Abel-Palmer of the Vermont Disability Law Project entered an appearance on behalf of the parents on November 17, 2006. Heather Thomas of Lynn, Thomas & Mihalich entered an appearance on behalf of the district on November 20, 2006.

On November 21, 2006, a prehearing conference was held at the district offices in _____, Vermont. Abel-Palmer and the parents were present. The director of special and the principal were present for the district.

A hearing was held on December 5 and 6, 2006. Pending a decision in the within case, the student has received tutoring from the district.

The following decision is based upon the evidence presented through testimony at the hearing, affidavits, and stipulated facts and exhibits.

Findings of Fact

1. The student is a nine year old who is currently in the 4th grade. He has attended the _____ School since kindergarten. Student has been diagnosed with ADHD. (Stipulation of Facts).
2. During the student's first grade year (2003-2004), a Family Support Team meeting was held on January 26, 2004 based upon the student's difficulty with visual memory, difficulty understanding and following directions, and difficulties controlling his behavior. At the meeting, the parents were asked to consent to special education testing which they declined. The participants agreed to send work home for the student to complete with his father and to investigate tutoring three times per week. (District Exhibit 1 [D1], page 4). The district did not seek due process to obtain a special education evaluation.
3. A second meeting of the Family Support Team was held on February 17, 2004. There were concerns about the student's reading including inattentiveness and continuing to decode after reading a story several times. Their plan included the parents helping the student with his homework, small assignments, moving his seat and rewards. (D1 at 9-10).
4. During the first grade year, the student experienced difficulties on the bus and disciplinary referrals in school. The student received three referrals for inappropriate behavior on the bus mainly for not staying in his seat and not obeying the driver and one referral involving fighting. (D1 at 5-6, 11-12, and 13-14). The student received five disciplinary referrals of which three occurred at recess and one occurred at lunch. (D1 at 1-2, 7, 8, 15, and 16).
5. Although the student had not satisfactorily met grade level expectations, he was assigned to second grade. (Parent [P] exhibit at page 1).
6. During the second grade year (2004-2005), the student continued to have academic difficulties with reading. On September 28, 2004, the Family Support Team met to discuss reading and behavior issues. Their plan included phonics tutoring, read and respond, and incentives. (D1 at 33-34). The district subsequently arranged one-on-one support during reading. (D1 at 48). Then, the district assessed the student's reading because of his difficulties he had with level 2 SFA reading program. Their assessment found the level 2 reading too difficult for the student and they reassigned the student to the highest of the level 1 reading groups. (D1 at 48-55).
7. The parents took the student to his pediatrician, Dr. Dan Larrow, during October 2004. Dr. Larrow diagnosed the student with ADHD. (Stipulation of Facts, Affidavit of Larrow). The parents did not inform the district at that time about the student's diagnosis. (Testimony of Messier).
8. The student continued to experience difficulties on the bus. The student received eight school bus incident reports. (D1 at 21, 32, 38, 40, 42, 61-62, 72, 73, and 74). One common thread in the incident reports is that the student failed to remain seated and failed to obey the bus driver. Another common thread is fighting or pushing. (D1 at 21, 32, 38, 42, 61, 72, and 73).

9. The student's school bus arrived at the school approximately 10 to 15 minutes before the doors opened and the students were kept on the bus during that time. (Testimony of parents and Messier). The parents testified that keeping the student in a closed, sitting school bus contributed to the student's difficulties.

10. Andre Messier, principal, suspended the student from riding the bus on January 24, 2005. (D1 at 76). Messier became principal prior to the start of student's second grade year and continued as principal through student's third grade. Messier extended the bus policy to give the student additional chances. (Testimony of Messier).

11. The student continued to receive written referrals for disciplinary infractions from September 2004 until mid March 2005. There were no written referrals after mid March 2005 for the remainder of the second grade. Six of the thirteen referrals refer to behavior during recess; five involved refusing to come in from recess. (D1 at 60, 63, 66, 80, 83, and 89). Four incidents occurred during physical education, after lunch, or at the end of the day. (D1 at 29, 37, 68, and 69). Five incidents involved fighting or pushing. (D1 at 29, 30, 63, 75 and 80).

12. The district asked the parents to sign consent for special education evaluation which the parents refused on January 11, 2005. (D1 at 70). The district did not seek due process for a special education evaluation.

13. On February 4, 2005, the district sent the parents a letter informing them that the student may not be promoted at the end of the school year based on academic and behavioral issues including not meeting grade level expectations, disturbing/disruptive behaviors, unable to work independently, unable to work independently, resentful of help, wasted class time, lack of class participation and poor test/assessment results due to refusal to take tests. (D1 at 79).

14. On February 9, 2005, Messier wrote the parents regarding an incident in which the father was called to the school after the student had pushed and hit another child during recess and then refused to leave the playground. Messier also used the letter to inform the parents that he had received permission from the school board to hire a one-on-one paraeducator to provide both behavioral intervention and academic help for the student.¹ Messier concluded that if the student's behavior did not improve with the paraeducator, they would look for an alternative placement. (D1 at 80, Messier testimony).

15. Dr. Larrow started the student on a prescription of Adderall during February 2005 to ease the effects of ADHD. (Affidavit of Larrow). The district was not informed at that time that the student was placed on medication. (Messier testimony). The medication had a positive effect on the student's behavior. (Messier testimony).

16. The parents and district met on March 7, 2005 and agreed to hire a behavioral specialist to observe the student and provide suggestions for a behavior plan. (D1 at 87).

¹ Messier sought funding from the school board to hire a one-on-one paraeducator to work with the student. If the student had been eligible for special education, the provision of a one-on-one paraeducator could have been covered through the funding stream for special education.

17. Jessica Garrow was hired to work as the one-on-one paraeducator with student in March 2005. (Messier testimony, Garrow testimony).

18. Garrow developed a relationship with the student and became very familiar with his personality and cues. Garrow initially sat next to the student for the first month. Later, she moved to another table and would check in with the student. Garrow found that she could ordinarily tell at the beginning of the day if the student had something on his mind that kept him from attending to school. Normally, she was able to redirect the student to his task. If not, she would pull the student from the class and talk to him to calm him down so he could return to class. During those times, he could not return to class, they would take school work to the planning room or the time away room. (Garrow testimony).

19. Garrow effectively provided one-on-one paraeducator services with the student from the date of her hire until her services as a one-on-one paraeducator were phased out by December break 2005. (Parents' testimony, Messier testimony).

20. Matt Bloom conducted the functional behavioral assessment. Bloom observed the student for 7.5 hours over the course of five days and obtained input from district staff and the mother. (D1 at 275-280). During the classroom portion, the student was on task 95% of the time. Bloom noted that Garrow's proximity to student helped her redirect the student and provide academic support.

21. Bloom made the following recommendations:

- a) Keep processing of behavioral incidents to a minimum to avoid reescalation.
- b) Continue the one-on-one paraeducator as a way to continue consistency, security and support.
- c) Be clear and consistent with directions and accountability. (Refers to student responding best when he knows what is expected of him.)
- d) Use a positive reinforcement program for student to earn tangibles during day.
- e) Staff member(s) should be trained in a de-escalation and restraint protocol.
- f) Remove the student quickly when his behavior is escalating so he can escalate and then de-escalate, preferably in a space that is not cluttered. Advise that student work through behavioral incidences.
- g) Develop a crisis plan but limit number of adults dealing with student as more adults trying to process with student can be stressful to student.
- h) Student may need more support than one-on-one paraeducator can provide and suggests a behavior interventionist such as the Collaborative Achievement Team (CAT).
- i) Team may want to consider a psychological or psychiatric evaluation.

(D1 at 278-279). Bloom noted that there had been a positive change in student's behavior since the referral was made and thought the change in classroom teacher² and the one-on-one paraeducator may explain the shift. (D1 at 276).

22. On June 7, 2005, the district held a meeting with the parents to discuss the student's academic and behavioral issues and to plan for the next school year. Amy

² Student's second grade teacher began a parenting leave. The substitute teacher was more of a disciplinarian.

Dunnevant reported on her findings from administering the Woodcock Johnson test. The student had a cognitive score of 100, verbal ability of 91, thinking ability of 114 and core efficiency of 91. Student exhibited weakness in long-term retrieval and reading fluency. Dunnevant did not find a learning disability. Academic recommendations included monitoring spelling and fluency, communicate with school, consult with pediatrician, encourage student to read more, and work with math facts. In terms of behavioral issues, they noted that the student was attempting to self-monitor and asked to use the little room to redirect. Their plan for the third grade included continuing with the one-on-one paraeducator at the beginning of the year with a fade out by December break, building a reinforcement plan, clear direction on use of planning room versus use of de-escalation space, practice going to planning room, and being quick and proactive if student's behaviors escalate. (D1 at 91 to 94).

23. At the end of second grade, the student had not satisfactorily met grade level but was assigned to grade 3. His quarterly grades show an improvement over the course of the year in literature and language arts. His second grade teacher's fourth quarter comments are, "[Student] has made great progress this quarter. He puts more effort into his work and seems to enjoy learning". (P at 2).

24. On September 19, 2005, Messier, Garrow, Deb Steinhour (student's classroom teacher), and Liz Minor (reading teacher) met to discuss support for the student. They agreed the triggers to the student's behavior were unpredictable. They agreed to use lunch with Messier as a reward, to send a daily journal to the parents, to continue the use of the behavior checklist and to increase times Garrow did not need to be with student. (D1 at 95).

25. On September 23, 2005, the district developed a Personalized Instruction Plan calling for accommodations of a one-on-one paraeducator, alternate classroom protocol for discipline and SFA reading. Both strengths and weaknesses were noted. Strengths included being friendly, caring, helpful, good sense of humor, strong verbal skills, and works well when focused. Weaknesses included growing problems with following directions, being respectful, handwriting, processing speed, reading, phonological awareness and comprehension.³ Student was described as experiential learner. Short-term goals included finding reading interests, remaining in the classroom, and improving fluency, phonological awareness and comprehension. (D1 at 96).

26. On September 26, 2006, mother, Garrow, Steinhour, and Minor met to discuss accommodations and possible testing through the Stern Center. They agreed to continue the behavioral checklist and give rewards at the end of the day. (D1 at 97). The parents agreed to an evaluation at the Stern Center provided the results were not used to qualify student for special education. (Messier Testimony).

27. The Stern Center performed a comprehensive evaluation on October 17, 2005. (D1 at 362-401). Testing revealed a full scale IQ of 91. (D1 at 364). Testing revealed that the student's rapid naming skills were well below average and could be a factor in his reading deficit. (D1 at 365). They noted that the student's deficits in rapid naming, vocabulary and word finding are indicators of specific learning disabilities. (D1 at 366). The student's oral reading quotient was in the deficient range. They found that the student's poor rate and accuracy significantly impact his reading

³ Strengths and weaknesses in subsequent Personalized Instruction Plans mirror the above plan.

comprehension. (D1 at 367). Student's handwriting was very awkward. (D1 at 367). The student's visual motor skills were similar to the profile seen in children with ADHD. (D1 at 368). The data from the Achenbach surveys to mother, teacher, counselor and special educator show concern for the student's "ability to attend, grow socially, and respond to redirection". (D1 at 369).

28. The Stern Center made the following DSM-IV diagnoses on Axis I:

- a) 315.00 Reading Disorder
- b) 314.01 ADHD combined type by history
- c) 315.2 Disorder of Written Expression

(D1 at 370).

29. The Stern Center made the following recommendations:

- a) Handwriting. Use of a specific handwriting program, occupational therapy evaluation, occupational therapy to develop fine motor coordination, and use of a slant board & pencil grips.
- b) Reading Decoding and Fluency. Use of reading program such as *Language!* or *Orton-Gillingham* to remediate basic reading skills, address fluency through intensive daily program either 1:1 or in small groups, and vocabulary instruction.
- c) Reading Comprehension. Listening work through activities such as stopping at certain points and asking questions about the story, etc.
- d) Spelling. Coordination of remediation and classroom work, activities such as use of a notebook, searching text for examples of rules, finding exceptions to rules.
- e) Written Expression. Using a program that combines phonics and typing skills, use of sentence-combining programs, use of pre-writing and planning, custom-made checklist for proofreading.
- f) Mathematics. Encourage student to highlight operation signs and help student memorize math facts.
- g) Academic Accommodations. Extend time for tests, read tests aloud, provide reading material at his reading level, consider books on tape, and re-assess next fall.
- h) Attention and Memory. Consider use of a resource notebook and specific coaching of executive functioning skills.
- i) Behavioral and Social Skills Development. Commended the district for assessment and interventions. Suggested a specific and structured behavior plan, keeping the one-on-one paraprofessional to help student become aware of triggers and to help student with coping skills, having the paraprofessional in contact with a counselor or behavior interventionist, having the system of rewards and consequences evolve, teaching student to ask for short periods of quiet time in a quiet space to deescalate, and having a lunch bunch of peers.

(D1 at 370-374).

30. During fall 2005, there were far fewer disciplinary referrals. (Messier testimony). Between October 27, 2005 and December 21, 2005, there were three referrals—teacher noticing a swear word on test paper, running behind school building, and not coming in from recess when the bell rang. (D1 at 109, 110, and 111). During

October 2005, there were two school bus incident reports for failing to sit down and fighting. (D1 at 107, 108).

31. During fall 2005, Garrow followed the June 7, 2005 plan to phase out her one-on-one work with the student. Garrow found that the majority of time student could function in the classroom. By the end of December, the student was working on his own. (Garrow testimony).

32. The student continued to work on his own during January 2006. There were no discipline incidents until February 2006. (D1 review)⁴.

33. The district crafted a Personalized Instructional Plan on January 17, 2006. Accommodations included individual Foundations reading tutoring three times/week, use of slant board, daily behavioral chart, use of pencil grip, and participation in guidance counselor's small group to work on social development and peer relationships. (D1 at 98).

34. The student was formally placed upon a Section 504 plan on February 6, 2006. (D1 at 99, Messier testimony). The 504 team met on February 6, 2006 and noted the student was making progress but was still below grade level expectation. The 504 team plan included providing the student with a daily calendar, level 2 spelling, math tutoring and informing parents of progress every 3 to 4 weeks. In addition, the parents would work with the student on spelling and math at home. (D1 at 99).

35. The student's behavior changed in February 2006. On February 6, 2006, the student pushed students while waiting in line to return from recess. (D1 at 112). On February 9, 2006, the student jumped on and grabbed another student. (D1 at 113). On February 14, 2006, the student threw a pencil across the classroom (D1 at 114).

36. At some point in February but before February 18, 2006, an incident occurred between the student and his third grade classroom teacher in which the teacher made a derogatory remark to the student. (Father's testimony, Messier testimony). The student was negatively impacted by the teacher's remark. (Father's testimony, Mother's testimony, Messier testimony). There was only one third grade classroom teacher. (Messier testimony).

37. To alleviate the student's distress, Messier decided to create an individualized plan for the student. The individualized plan was not necessitated by any concerns for the student's behavior. (Messier testimony). The individualized plan went into effect on February 18, 2006. Under the plan, the student was pulled from his third grade classroom. He was placed in the fourth grade classroom of Amber Renaudette. (D1 at 100). Renaudette was the student's reading teacher, and the student would continue in the same reading group. (Renaudette testimony). The student would participate in morning meeting in Renaudette's classroom and then reading until 10:10 a.m. Student would receive math tutoring from either Lynn Cota-Caforia or paraeducator Deb Hardy. Student would attend lunch and specials with his class. Garrow was brought back to provide tutoring on Tuesdays, Wednesdays, and Thursdays from noon to 3:00 p.m. in language, history, and science. Garrow was not there as a one-on-one paraeducator. (Garrow Testimony).

⁴ D1 contained copies of all disciplinary write-ups.

38. During the spring of 2006, the Adderall prescribed to the student had decreased in effectiveness. (Larrow affidavit, Parents' testimony, Messier testimony, Garrow testimony).

39. Subsequent to the individualized plan for the student, the student's behaviors escalated. The student received ten written referrals for his behavior. (D1 at 115, 117, 119-120, 121, 125, 127, 130, 131, 133, and 137). Seven of these incidents took place at recess or lunch. Six of the incidents involved hitting or fighting. Messier referred to the spring of 2006 as the return of the old student or a student, who was defiant, would leave a classroom without permission, would not return from recess, and was not re-directable. (Messier testimony). Towards the end of third grade, there was an increase in aggressive behavior towards others by the student. (Lester affidavit).

40. On June 13, 2006, Messier, Garrow, Cota-Caforia, Renaudette, Hardy and the parents met to plan the student's fourth grade year. (D1 at 101-103). They began their meeting knowing that Garrow was leaving (Garrow testimony) and that Messier and Lester (guidance counselor) were leaving (Messier testimony). The student would be losing three people with whom he had a relationship. District staff communicated to the parents the continuing escalation of the student's behaviors. (Messier testimony). Despite the student's downward spiral during spring 2006, the team decided that the student would not have a one-on-one aide for fourth grade but could access the classroom aide and decided not to have a behavior plan. (D1 at 101-103).

41. There was contradictory testimony by the parents, Messier, Cota-Caforia, and Renaudette about the reasoning behind the decisions made at the June 13, 2006 meeting. In addition, there were contradictions within the individual testimony of witnesses about their reasons. Based on the state of the evidence, no finding will be made regarding the participants' reasons for agreeing to a plan that did not include a one-on-one aide or a behavior plan. However, common sense should have led to a plan that included adequate supports and clear behavior expectations and plans given the student's decompensation from February to June of 2006.

42. The student started a new medication, Focalin, on July 31, 2006 to treat his ADHD. (Larrow affidavit).

43. On August 30, 2006, Renaudette, Jen Kinney (paraeducator), Randy Clark (assistant principal), Monica Sweet (school counselor), and the mother met to review the plan for fourth grade which included full integration into the classroom, no behavior chart, and no one-on-one supports but availability of Kinney for support. Mother reported that the student was on a new medication for ADHD and gave the team sufficient information that they noted the need to watch for the effects of the medication. (D1 at 141).

44. Focalin did not effectively control the student's ADHD. On October 11, 2006, Dr. Larrow prescribed Concerta. Use of Concerta initially caused behavior difficulties for the student. (Larrow affidavit). Mother informed district personnel of the changes in medication and dosage. (Mother's testimony).

45. During the time period leading up to the student's placement outside the school, the student's medication for ADHD did not have his symptoms under control. (Larrow affidavit). By November 1, 2006 (after the student's removal from school on October 26, 2006), the dosage of Concerta had been calibrated so that the medication had a positive and consistent effect. (Larrow affidavit).

46. The student experienced behavioral difficulties from the beginning of fourth grade. (Renaudette testimony, Kinney testimony). Student was first suspended for a half-day internal suspension on September 1, 2006 due to an incident in which he got into his locker and refused to come out. (D1 at 226, 229-230, Renaudette testimony).

47. Prior to the 504 team meeting of September 19, 2006, the student was suspended on two other occasions. On September 13, 2006, the student received a one day internal suspension when he ran away from his group into the woods and the crisis team needed to be called to retrieve him. The student served an external 2 day suspension on September 15 and 18, 2006 when he hit a student on the head, was noncompliant and nonredirectable. (D1 at 226, 247-250, 251-256, Renaudette testimony, Cota-Caforia testimony).

48. On September 19, 2006, Cota-Caforia, Renaudette, Kinney, Sweet, Clark, Jennifer Mattson (504 case manager), Christine Nichols (planning room paraeducator), Larrow, and the parents met. They noted that the student has problems staying focused, leaves the classroom without permission, and is nonresponsive to staff efforts to redirect him. They agreed to make accommodations including:

- a) In-class paraprofessional support.
- b) Predetermined/scheduled classroom breaks.
- c) Behavior Intervention Plan.
- d) Access to fidget objects.
- e) Daily schedule located at desk.
- f) Recess plan.
- g) Referral for a Functional Behavioral Assessment.

The Behavior Intervention Plan included behavior check-ins of thirty minutes and included both behavior rewards and consequences. (D1 at 145-154).

49. The student continued to experience difficulties. The student served a two day external suspension on September 28 and 29, 2006 due to physical aggression (pushing down on arms to leave time-away room) towards Kinney. (D1 at 226, 257-261, Kinney testimony).

50. Matt Bloom conducted a functional behavioral assessment on Monday, October 2, 2006. He did an on-site observation at the school for 3 hours and 40 minutes. (D1 at 156). October 2 was the first day the student returned to school after a two day suspension. Bloom notes that the student's mother was called that morning and took the student home for an hour. (D1 at 158, Mother's testimony). Bloom found that the student's behaviors were consistent with ADHD in addition to including oppositional and avoidant behaviors. Bloom's recommendations included:

- a) A more comprehensive behavior plan. Suggested use of a differential reinforcement of other behavior plan.
- b) A behavior contract including target behaviors and consequences based on the severity of the behavior. The contract should be re-evaluated weekly.
- c) Use of a modified day program.
- d) Consultation with a child psychiatrist and possible use of medication.
- e) Special education testing to see if some of the roots of student's behavior are academically based.
- f) Support services through the local mental health agency.
- g) Use of time-out space that is quiet and nonstimulating. Staff should be trained regarding reductive procedures.
- h) Use of a behavior interventionist to work one-on-one with the student.
- i) Student could benefit through placement at alternative day treatment school.

(D1 at 156-162).

51. Starting the afternoon of October 2, 2006, the student began a 3.5 day suspension due to a fight in the lunchroom. (D1 at 226, 262-265).

52. The 504 team met on October 2, 2006 to address the functional behavior assessment. They decided to update the behavior plan, send home a daily school journal, work on a behavior contract, and continue the use of the time-away room. The mother would be called after the student was in the time-away room for 15 minutes and then the father would be called after 30 minutes. (D1 at 163-169). The parents asked for the phone calls because they had concerns the student was staying in the time-away room for long periods. (Parents' testimony).

53. On October 3, 2006, the 504 team met and discussed the Stern Center report and proposed special education evaluation. They amended the behavior intervention plan. (D1 at 170-175). A comprehensive behavior plan was finalized on October 4, 2006. The new plan set up ten minute intervals. The initial target percentage was 30% for half day intervals. As the student achieved success, the target percentage would be increased. They defined different levels of behavior and included a script for intervention and redirection. (D1 at 176-179). The new behavior plan started on the student's return to school on October 6, 2006.

54. During the first week the student used the revised behavior plan, the student was on task as follows:

October 6	55% in a.m.	99% in p.m	75% day
October 9	25%	70%	45%
October 10	50%	90%	70%
October 11	65%	50%	55%
October 12	40%	40%	40%

(D1 at 205). Based on the chart, the student was on target 90% of the time. On October 10, 2006, the student was placed in the planning room for the day after hitting another student. (D1 at 226, 266).

55. The target percentages were increased to 10/21(approximately 50%) for each half-day starting October 13, 2006. (P at 13). The student was on task as follows:

October 13	30%	50%	50%
October 16	25%	10%	20%
October 17	80%	70%	75%
October 18	75%	80%	75%
October 23	15%	75%	45%
October 24	85%	25%	50%
October 25	5%	0%	5%
October 26	5%	0%	5%

(D1 at 205). Kinney noted that the student understood what the expectations were and would work to that level. She noted the student could also self-regulate himself during time-away so that his father was not called. (Kinney testimony). During this same period, the student served a 1 day external suspension on October 25, 2006 for becoming oppositional, running through the building and noncompliant (D1 at 272-274) and a 1 day external suspension on October 26, 2006 for being oppositional, grabbing a stick and refusing to put it down (D1 at 226). District staff questioned the effectiveness of the behavior plan. (Kinney testimony, Cota-Caforia testimony). In addition, during fall 2006, the student received disciplinary write-ups and bus infractions in addition to the suspensions. These infractions are similar in nature to previous years' infractions. (D1 at 238, 239, 241, 270-271, 234-236).

56. On October 16, 2006, the mother consented to a special education evaluation looking at specific learning disability, emotional disturbance, and ADHD. (D1 at 184, Mother's testimony).

57. On October 26, 2006, the district held a manifestation hearing. They determined that the student's behaviors were a manifestation of his disability. They concluded that ADHD was the driving factor, the behavior plan was not effective, the student's behaviors were impulsive, and that it was difficult to figure out the trigger to the student's behaviors. The district decided Project SOAR was appropriate; the parents did not agree. (D1 at 191-197). The parents requested information about the CAT program and asked for other accommodations. (Parents' testimony).

58. The district notified the parents by letter dated October 30, 2006 that they were placing the student into Project SOAR, an IAES, effective November 13, 2006 and would provide tutoring to the student in the meantime. (D1 at 199-200).

59. The district believes that they have exhausted their resources coping with the student and that they are unable to afford an education to the student. (Cota-Caforia testimony). On two occasions, Renaudette had to remove her students due to disruptions caused by the student. (Renaudette testimony). On three occasions, a reading group adjacent to the time-away room had to be removed because of disturbances from the student in the time-away room. (Kinney testimony). Kinney had been placed in the Renaudette classroom as a paraeducator for the entire classroom. She found her time increasingly devoted to the student. (Kinney testimony). Both Renaudette and Kinney testified to continual disruptions.

60. The parents believe that the district can educate the student provided that appropriate supports are put in place such as a one-on-one aide and a behavior interventionist or creating a program with individual tutoring in school and selective

integration with peers. They point to time periods when the student was able to succeed in the classroom and the types of support which enabled the student to succeed. They point to time periods when the student's medication has controlled symptoms. The student is now on a proper regimen of medications. (Parents' testimony).

61. Student's behavior did not cause any injuries to other students or staff or the need for any medical treatment. (Messier testimony, Cota-Caforia testimony).

62. At all times relative to this hearing, Project SOAR has not had an opening for a fourth grade student. (Mother's testimony, John Nielson testimony).

63. To reach Project SOAR, the student would be transported by minivan approximately one hour each way. (Nielson testimony). Student has well documented history of problematic behaviors on the school bus to his local school (see previous findings). His local school is only one mile from his home. (Father's testimony).

64. John Nielson, Project SOAR coordinator, testified. The student has not been evaluated to see if he is appropriate for their program. Project SOAR has only received a referral from district. They want both the district and the parents on board. If the parents believe a student is not appropriate for their program, it falls to the district to find appropriate measures to educate the student. (Nielson testimony).

65. Garrow has been the student's tutor during this time. The student has behaved well and is successfully completing his academic assignments. His scores have been 80% or higher. (Garrow testimony).

66. Larrow referred the student to Dr. Mooney, a psychiatrist at Northwest Counseling and Support Services. (Larrow affidavit). The student is now receiving medication to adjust his mood and will have follow up treatment. (Mother's testimony).

Conclusions of Law

The student is presently on a Section 504 plan and is being evaluated for special education based upon specific learning disability, emotional disturbance, and other health problem (ADHD). Although the student has not yet been found eligible for special education, the student is guaranteed the same protections as a special education student who is facing removal to an IAES. 20 U.S.C. § 1415(K)(5), VSER § 4313.5.⁵

⁵ Although the following analysis will be based upon federal and state special education regulations, the analysis for Section 504 students is similar. The same emphasis on mainstreaming students exist. *Letter to Williams*, infra. Manifestation determinations requirements are similar. 34 C.F.R. § 104.35, VSER § 4312. VSER § 4312(9)(a) places the burden of proof on the district for a change of placement of less than 45 days—the burden is to show that maintaining the current placement is likely to result in injury to the child or others. The special education regulations are silent as to burden of proof; however, the burden would appear to be on the moving party pursuant to the Supreme Court's ruling in *Schaeffer v. Weast*, No. 04-698 (Nov. 14, 2005). See *Federal Register*, Vol. 71, No. 159, pg. 46723 (Aug. 14, 2006). As can be seen in the following discussion of the evidence in the within case, the parents have sustained their burden of proof.

The parents disagree with the district regarding the appropriate response to the manifestation determination that the student's behavior is related to his disability. The district is seeking the student's removal to an IAES claiming that the IAES is the least restrictive environment for the student's education. The parents claim that the least restrictive environment is the student's placement in the elementary school with the provision of appropriate supplementary aids and services.

The Individuals with Disabilities Education Act is predicated upon educating children with disabilities in regular classrooms to the extent possible or in the least restrictive environment (LRE). 42 U.S.C. §§ 1400-1485. *Hendrick Hudson Dist. Bd. Of Educ. v. Rowley*, 458 U.S. 176 (1982). To do so, supplemental aids and services are to be provided. 42 U.S.C. § 1412(5)(B). When the child cannot be educated within the classroom with supplemental aids and services, the child can be moved to a more restrictive setting. This case raises the question of where the student should be educated in the context of a proposed move arising in response to a student's behavior.

In making these types of determinations, the hearing officer's authority derives from 20 U.S.C. § 1415(K)(3)(1)(B)(ii) which states:

In making the determination..., the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may-

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

The hearing officer's statutory authority pursuant to 20 U.S.C. § 1415(K)(3)(1)(B)(ii)(I) is further clarified at 34 C.F.R. § 300.532(b)(2)(i) in which the hearing officer may return a child to a placement if the hearing officer finds that the removal was a violation of 34 C.F.R. § 300.530. See also VSER § 4313.3(b)(2) which parallels 34 C.F.R. § 300.532(b)(2).

The conduct of the manifestation determination raises concerns. Part of the manifestation determination is to look at whether the student's conduct was a result of the district's failure to implement the IEP or Section 504 Plan. 34 C.F.R. § 300.530(e)(ii), VSER § 4313.1(e)(1)(ii). Here, the plan formulated at the end of the student's third grade year was inadequate. The plan's inadequacy negatively impacted the student's conduct.

The student had made progress regulating his behavior and increasing his academic competency after the district added a one-on-one aide as a supplementary service for the last quarter of second grade and the beginning of third grade. By all indications, the student was functioning well without the one-on-one aide during January 2006. The student was set back after an unfortunate episode with his third grade teacher when the teacher made a derogatory remark to him. The school's response was to carve out a program for the student and place him outside his third grade classroom. By the end of third grade, the student's behavior had deteriorated. Despite the deterioration, the decision was to mainstream the student into his classroom without a designated one-on-one aide and without a behavior plan. In the event this experiment

did not work, no contingency plan was created to reintroduce the supports that had worked for the student in the past.

The lack of an adequate plan contributed to the student's conduct at school.

Several factors compounded the lack of an adequate plan including:

- a) Medication problems. Student's initial prescription for Focalin was not effective. Although the student's prescription was switched to Concerta, the student's dosage had not yet reached the level where his ADHD behaviors would be impacted. There is no indication that the effects of medication were factored in to the district's planning for student.⁶
- b) Not implementing recommendations from the first Functional Behavioral Assessment including use of a designated one-on-one aide for student and retaining the services of a behavior interventionist.
- c) Changing plans. The student needs consistency as well as clear expectations. The changing behavior plans created additional challenges for the student.
- d) Not implementing recommendations from the second Functional Behavioral Assessment including use of a designated one-on-one aide, retaining the services of a behavior interventionist, and a psychological or psychiatric evaluation.⁷

The district has argued that they placed extensive supports in place for student and do not have the ability or means to make further accommodations to retain the student in the school. This argument is problematic on two fronts. First, an allegation that a district's resources have been exhausted is not a sufficient reason in and of itself to place a student in a separate placement. *Letter to Johnson*, 213 IDELR 182 (OSERS 1988). Secondly, and more importantly, there were supplemental aids and services the district could have used to keep the student in his present placement—(1) use of a one-on-one aide based on past success, (2) retaining a behavioral interventionist, and (3) following up on the recommendation for psychological or psychiatric intervention. In terms of supplemental aids and services, the student's stabilization on his ADHD medications and the addition of other psychotropic medication provided student with increased resources to work within the school environment.

Further, a student can be placed in a separate classroom or placement only if the student's education cannot be achieved in the classroom even with the provision of supplemental aids or services. 34 C.F.R. § 300.114(a)(2)(ii); VSER § 2364.1. The evidence does not support such a finding.

The case of *Oberti v. Bd. of Ed.*, 995 F. 2d 1204 (3d Cir. 1993) adopted a two pronged test from *Daniel R.R.*, 872 F. 2d 1036, 1044 (5th Cir. 1989) when deciding if a child should be removed from the regular classroom. The first prong asks whether the

⁶ During the fourth grade, the mother was forthcoming to the district about the student's medications. However, in the past, the parents were not forthcoming to the district about the student's diagnosis or medication. For the district to fully factor in the impacts of medication and to know what to look for in terms of medication glitches, the district needs to be kept informed by the parents in a timely manner.

⁷ The parents have since had the student assessed by a psychiatrist, placed on medication, and scheduled follow-up visits.

child's education can proceed satisfactorily with supplemental aids and services; the second prong looks at the continuum of alternate placements available to the school. The *Oberti* court refined the first prong to include (1) whether the school has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular classroom, with appropriate supplementary services, as compared to the benefits provided in a special education classroom; and (3) the possible negative effects of the inclusion of the child on the education of other children in the classroom. *Oberti* at 1217-1218.

Looking at this case, the evidence does not support a finding that the *Oberti* criteria were met. First, the plan designed at the end of third grade and implemented at the beginning of fourth grade was inadequate. Past successful interventions such as a dedicated one-on-one aide were not used. Although the district made Kinney available to the student as the fall progressed, the use of Kinney was qualitatively different than the previous use of Garrow who had been clearly identified to the student as his one-on-one aide and who had the space and ability to quickly react to the student and redirect his behavior. Second, it is hard to address comparable educational benefits from the district versus the IAES since the designated IAES was never a realistic alternative as Project SOAR did not have space available for student and the evidence about its program was scanty at best. Third, possible negative effects on the classroom are speculative. Past disruptions occurred when the student did not sufficient supports in place. Now, the student's behaviors are responding to medication and a return to the classroom will be accompanied by planning including the provision of appropriate supplemental aids and services. Fourth, looking at the second prong, the evidence does not show that the full continuum of placements (including one-on-one aids, behavioral interventionists, use of tutoring in the school with selective mainstreaming) was investigated or considered.

There is one further consideration in this case. The least restrictive environment can be outweighed if there is a sufficient safety threat or showing that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997). Looking at other cases for the evidence considered sufficient to show that maintaining a placement is likely to result in injury to the child or to others is instructive.

The student 's behavioral difficulties have mainly arisen during recess, lunch, specials, and on the bus—times when there is less supervision. The evidence has not demonstrated any injury to the student and no reports of students or staff seeking medical attention or having serious injuries. See *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223 (8th Cir. 1994) (ruled for the district in removing 13 year old student with multiple mental impairments from her self-contained classroom to an IAES based on record with multiple incidents weekly of biting, hitting, kicking, poking, throwing objects and overturning furniture including 30 incidents in a 2 year period in which staff or students needed to seek medical attention from the nurse); *South Pasadena Unified School District*, 43 IDELR 175 (SEA CA 2005) (10 year old student diagnosed with emotional disturbance (including mood disturbance and PTSD) and learning disabilities, removed to an IAES. Student had history of physical aggression culminating in major assault involving "clothesline" forearm choke on one student and forceful kicking of another student.); *Clyde K. ex rel. Ryan K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994) (ruled for district in removing 15 year old student with Tourette's syndrome and ADHD based on escalating behaviors including violent confrontations (assaults), with

staff and students, sexual harassment of female students, profanity, and name calling); *Hartmann*, supra (District had first made extensive accommodations for 11 year old autistic child including adjustment of schedule, curriculum modifications, hiring and training of one-to-one aide, extensive training for teachers, and hiring of autism consultant. Child engaged in repetitive instances of hitting, kicking, biting, pinching, and removing clothing.) Contra, see *Scranton School Dist.*, 29 IDELR 133 (SEA PA 1998) (Nineteen year old student diagnosed with severe emotional disturbance threw furniture, used threatening language, punched at teacher, but no injury to student or others. Held for parent. Also, noted behavior improvement after medication changed.); *Clinton County R-III School District v. C.J.K.*, 23 IDELR 306 (W.D. Mo. 1995) (ruled that school could not remove 13 year old with behavior disorder and learning disability who had threatened others, violently thrown furniture including one incident that caused an injury to a student's ankle, and where teachers were afraid. Judge thought some of the behaviors were learned responses to cope with learning disabilities. Found that it was speculative to anticipate serious physical injury.); and *Cabot School District*, 27 IDELR 304 (SEA AR 1997) (Ninth grader with ADHD swore at staff, failed to follow instructions, and threatened assistant principal. Found the behavior inappropriate but not dangerous.).

Looking at the range of behaviors that have justified removal in other cases, the evidence here does not rise to the level of finding that there is a substantial risk of injury to the student or others if the student remains in the school.

At this point, both the parents and the district have the opportunity to start fresh. In considering the student's needs, it is important that the parties have full information, especially, as they face the prospect of crafting an IEP once the special education evaluation is completed, or, in the alternative, amending the Section 504 plan. To that end, the student's pediatrician and mental health provider should be part of the process. The district needs to know what medications the student is taking including potential side effects. If the medication is not working, the district needs to know so that this information can be factored into an appropriate plan for the student.

Order

1. The student shall be returned to his placement in the _____ School beginning in January 2007.⁸ The parties will use the present time to meet and plan the student's reentry into school. In addition, the district shall continue services such as tutoring pending the student's reentry.

2. The district shall hire as soon as possible a one-on-one paraeducator to work with the student.⁹ If possible, the district shall consult with Jessica Garrow and see whether Garrow can provide any training or information that will facilitate the work of the one-on-one paraeducator.

⁸ The reason for waiting until after the December break is to give sufficient time to plan for the student's reentry into school. In addition, the parents, as part of their claim for relief, mentioned the possibility of the Richford School. I do not have sufficient information to consider this, but the parties are free to discuss this alternative.

⁹ It is anticipated that the present classroom paraeducator will not be used in this capacity but will remain in her present capacity for the entire class.

3. The district shall hire as soon as possible a behavior interventionist or specialist such as Shona Marston to work with the student, district, and family.

Dated this 18th day of December, 2006 at Burlington, Vermont.

Lila Shapero
Hearing Officer

Appeal Rights

Parties have a right to appeal this decision by filing a civil action in a federal district court or a state court of competent jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)(a). Such appeal must be commenced within 90 days of the date of this decision.